FROM SOCIAL JUSTICE TO ANIMAL LIBERATION

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INTRODUCTION

When a billion dollar corporation tortured thousands of pigs by roasting them to death as they screamed, the punishment was swift and severe—not for the corporation, but for the activist who filmed it.¹

Nine years earlier, the same corporation, Iowa Select Farms, was exposed in a similarly harrowing video: piglets hurled about like refuse, their skulls smashed into concrete, open sores festered, caged skintight, mouths desperately gnawed on bars, and more screams.² Yet Iowa responded not by passing new regulations to prevent further brutality, but rather by passing the Nation's first ag-gag law, which criminalized the release of the incriminating footage.³ That same year, the United States Supreme Court unanimously held that California could not require that dying cows and pigs, broken by years of brutality and neglect, receive the mercy of a quick death.⁴

 * Special thanks to Julia Nagle for the work on corporate liability she contributed to this article.

¹ See Donnelle Eller, Charges Dropped Against Animal Rights Activist Who Secretly Filmed Iowa Pigs Being Killed, DEs MOINES REG. (Jan. 29, 2021), https://www. desmoinesregister.com/story/money/agriculture/2021/01/29/secret-filming-grundycounty-iowa-pig-killings-felony-charge-dropped/4310605001/. Matt Johnson, the activist who exposed the cruelty at Iowa Select Farms, initially faced felony trespass charges. *Id.* However, Iowa Select Farms "asked that the [] case be dismissed after Johnson subpoenaed employees to testify," including the owner. *Id.* Johnson has since been charged. *Id.*

² Anne-Marie Dorning, *Iowa Pig Farm Filmed, Accused of Animal Abuse*, ABC NEWS (June 29, 2011), https://abcnews.go.com/Business/iowa-pig-farm-filmed-accused-animal-abuse/story?id=13956009.

³ Dan Flynn, *Iowa Approves Nation's First 'Ag-Gag'Law*, FOOD SAFETY NEWS (Mar. 1, 2012), https://www.foodsafetynews.com/2012/03/iowa-approves-nations-first-ag-gag-law/; *see generally* Krissy Kasserman, *Ag-Gag Laws Are Unconstitutional But Iowa Sure Keeps Trying*, FOOD & WATER WATCH (June 29, 2020), https://www.foodandwaterwatch.org/news/ag-gag-laws-are-unconstitutional-iowa-sure-keeps-trying. Notably, ALDF went on to challenge Iowa's ag-gag law as unconstitutional, succeeding in court, only to have the Iowa legislature pass yet another ag-gag law. *Id*. Iowa then passed a second ag-gag law, which ALDF again successfully challenged, only to have the Iowa legislature make yet another attempt, passing a third ag-gag law. *Id*.

⁴ National Meat Ass'n. v. Harris, 565 U.S. 452 (2012) (holding that the Federal Meat Inspection Act preempted the California Penal Code provision requiring immediate euthanasia of nonambulatory animals); *see also* David N. Cassuto, *Meat*

Given the deeply entrenched anthropocentric status quo, where animal cruelty is legally justified so long as the cruelty is "standardized" (i.e. profitable to industry);⁵ where the percentage of American vegetarians has remained a paltry 1% since the mid 1990's;⁶where the global, long-term impacts of animal industries threaten the right of both future human and nonhuman animals to thrive,⁷ this Article calls for a fundamental reimagining of animal law and policy, oriented around the cultivation of transgenerational empathy.

Recognizing that upstream policies aimed at long-term change have been neglected in the animal advocacy space--and guided by the principle that animal rights and human rights are ultimately interdependent--this Article proposes investments in family planning and early childhood education to ensure that every future child has the resources to thrive. Endowed with a fair start in life, those children, and their children's children, may develop and express greater empathy and, in turn, better protect the rights of those most vulnerable among us, both two and four-legged. By the same token, the interdependence of animal and human rights necessitates the reorientation of current animal law and policy initiatives toward a rallying cry of social justice for all sentient beings. While remedying things like the animal rights movement's relative silence in the face of recent attacks on women's bodily autonomy⁸ will be one example of threading animal protection into the larger social justice movements, such a reorientation might begin with holding corporations accountable rather than animal industry laborers, who are themselves frequently victims of corporate cruelty.

Buoyed by a broader coalition across the social justice spectrum and a more empathetic future populace, along with the continued rise of cruelty-free alternatives and corresponding decreased dependence upon animal-exploiting industries,⁹ the end of legalized, standardized cruelty is possible.

But it will take a reconceptualization of "animal law" itself as an aspiration, not as top down provisions of law handed down by anthropocentric concentrations of power disconnected from the actual practice of social, political, economic and environmental justice the system that created the climate crisis—but as the ideal of bottom up, inclusive and just systems that have aligned the matching values of animal liberation, ecological restoration, economic equity, and participatory and reflective democracy,

I. ANIMAL LAW AS MISNOMER

Given the abundant evidence that "animal law" in its current form is but a misnomer, the need to reimagine animal law and policy becomes clear.

a. Personification of Corporations and Objectification of Animals

Animal lawyers have long been hamstrung by the persistent jurisprudential objectification of sentient beings, with courts embracing an ostensibly narrow definition of legal personhood,¹⁰ notwithstanding the expansion of rights afforded corporate "persons."¹¹

¹⁰ See, e.g., ALDF v. USDA, 933 F.3d 1088 (9th Cir. 2019); People ex rel. Nonhuman Rts. Project, Inc. v. Lavery, 124 A.D.3d 148 (N.Y. App. Div. 2014); Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259 (S.D. Cal. 2012). *But see* Community Of Hippopotamuses Living In The Magdalena River, Applicant, To Issue Subpoenas For The Taking Of Depositions Pursuant To 28 U.S.C. § 1782, No. 1:21-mc-23, 2021 WL 5025353 (S.D. Ohio Oct. 15, 2021) (Verdict, Agreement and Settlement) (allowing hippopotamuses as "interested persons" under 28 U.S.C. § 1782 to receive discovery).

¹¹ See, e.g., Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that the First Amendment prohibits the government from restricting political independent expenditures by corporations); Burwell v. Hobby Lobby, 573 U.S. 682 (2014) (holding corporation had a right under the Religious Freedom Restoration Act to deny employees health coverage for contraception, which employees would otherwise be entitled to); Kent Greefield & Adam Winkler, *The U.S. Supreme Court's Cultivation of Corporate Personhood*, THE ATLANTIC (June 24, 2015), https://www.theatlantic.com/politics/archive/2015/06/raisins-hotels-corporate-personhood-supreme-court/396773/.

Animals, Humane Standards, & Other Legal Fictions, LAW, CULTURE & THE HUMAN. 1, 12 (2012) ("A slaughterhouse facility can seriously injure an animal, take in and slaughter animals already gravely sick or injured, and process them into the human food supply, all the while treating them humanely. This humane treatment is accomplished through the oversight of meat inspectors whose mandate has literally nothing to do with animal welfare.").

⁵ As Professor David Cassuto & Amy O'Brien note, "animal cruelty laws define necessity in terms of the needs of the person inflicting the cruelty." David N. Cassuto & Amy O'Brien, *Don't Be Cruel (Anymore): A Look at the Animal Cruelty Laws of the United States & Brazil with a Call for a New Animal Welfare Agency*, 43 B.C. ENV'T AFF. L. REV. 1, 16 (2016).

⁶ While the percentage of "self-identified vegetarians" has increased in recent years, the majority of self-identified vegetarians report having eaten meat when asked to list everything they ate during two non-consecutive 24-hour periods. Saulius Šimčikas, *Is The Percentage Of Vegetarians and Vegans In The U.S. Increasing?*, ANIMAL CHARITY EVALUATORS (Aug. 16, 2018), https://animalcharityevaluators.org/ blog/is-the-percentage-of-vegetarians-and-vegans-in-the-u-s-increasing/#2.

⁷ See, e.g., Kyle H. Landis-Marinello, Comment, *The Environmental Effects* of Cruelty to Agricultural Animals, 106 MICH. L. REV. FIRST IMPRESSIONS 147 (2008), http:// www.michiganlawreview.org/firstimpressions/vol106/landis-marinello.pdf.

⁸ See Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

⁹ See, e.g., Bill Gates, *The Future of Food*, GATES NOTES (Mar. 18, 2013), https://www.gatesnotes.com/about-bill-gates/future-of-food; *11 Industries Responding to the Meatless Revolution*, CBI INSIGHTS (Oct. 15, 2019), https://www.cbinsights.com/ research/meatless-transforming-industries/.

In United States v. Martin Linen Supply Co., the Supreme Court included corporations within the Fifth Amendment's protection against double jeopardy because such protection was necessary to protect corporations from "anxiety" and "insecurity."¹² Of course, it is animals, not corporations, that possess the capacity to suffer anxiety, insecurity, stress, and pain. ¹³ And yet, courts refer to animals as "property,"¹⁴ "the consumed,"¹⁵ and "goods,"¹⁶ with one court conducting a thorough textual analysis to determine whether 72 pigs who had perished on an airplane flight were "damaged goods" or "destroyed goods."¹⁷ (The USDA refers to animals as "units," where "an animal unit is equivalent to 1,000 pounds of live weight."¹⁸).

While corporate "persons" may spend money to influence (1) the elections of political representatives, (2) the positions that those representatives take on particular issues, and (3) the officials chosen to head the administrative bodies that regulate them,¹⁹ animals have virtually no legal protections or remedies. This inverse relationship between corporate power and that of animal welfare plays out in stark terms under anti-cruelty statutes: all fifty states have laws against animal cruelty, and all fifty states have explicit or implicit exemptions that immunize standardized corporate cruelty—exemptions secured through industry lobbying and regulatory capture.²⁰

¹³ Jeffrey Moussaieff Masson & Susan McCarthy, WHEN ELEPHANTS WEEP: THE EMOTIONAL LIVES OF ANIMALS 232 (1995); Tim Carman, *Scientists Say Fish Feel Pain*, WASHINGTON POST (May 24, 2018), https://www.washingtonpost.com/news/ food/wp/2018/05/24/scientists-say-fish-feel-pain-it-could-lead-to-major-changes-inthe-fishing-industry/.

¹⁴ See, e.g., Matter of Ruth H. v. Marie H., 159 A.D.3d 1487, 1490 (N.Y. App. Div. 2018) (finding the court exceeded its authority in directing petitioner to find foster care for respondents' cat because the cat was "property").

¹⁵ Animal Legal Defense Fund v. Hormel, Public Justice Food Project (Apr. 8, 2019) ("ALDF, however, is organized and operating to promote not the interests and rights of the consumers of Hormel meat products, but rather those of the consumed.").

¹⁶ Nuijens v. Novy, 543 N.Y.S.2d 887, 890 (N.Y. Town Ct. 1989).

¹⁷ Hughes-Gibb & Co. v. Flying Tiger Line, Inc., 504 F. Supp. 1239, 1242 (N.D. Ill. 1981). *But see* OR. REV. STAT. § 167.305(1) (2017) ("Animals are sentient beings capable of experiencing pain, stress and fear.").

¹⁸ Robert L. Kellogg, *Profile of Farms with Livestock in the United States: A Statistical Summary*, U.S. DEP'T OF AGRIC. (Feb. 4, 2002), https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/home/?cid=nrcs143_014121.

¹⁹ See, e.g., Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, THE ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/?msclkid=ce0018caae0111ecb0fee24273cbaa89.

²⁰ See, e.g., Dion Casey, Agency Capture: The USDA's Struggle to Pass Food Safety Regulations, 7 KAN. J.L. & PUB. POL'Y 142, 142 (1998) (discussing the capture of the USDA by the meat industry); Katharine M. Swanson, Carte Blanche for Cruelty: Standard industry practices that ostensibly fall outside the scope of the cruelty laws include ventilation shutdowns,²¹ water-based foam,²² anal and genital electrocution,²³ thoracic compression,²⁴ maceration,²⁵

The Non-Enforcement of the Animal Welfare Act, 35 U. MICH. J.L. REFORM 937, 953 (2002) (describing how the regulatory requirements for exercise of dogs under the AWA were weakened in response to pressure from the biomedical industry); Rebecca P. Lewandoski, Spreading the Liability Net: Overcoming Agricultural Exemption with EPA's Proposed Co-Permitting Regulation Under the Clean Water Act, 27 VT. L. REV. 149, 149 (2002); John C.P. Goldberg, Twentieth-Century Tort Theory, 91 GEO. L.J. 513, 560 (2003) ("[P]harmaceutical companies capture the regulatory process."); Collette L. Adkins Giese, Twenty Years Wasted: Inadequate Usda Regulations Fail to Protect Primate Psychological Well-Being, 1 J. ANIMAL L. & ETHICS 221, 244-45 (2006) (discussing USDA's willingness to significantly weaken its proposed primate regulations in response to concerns from the biomedical industry); J.B. Ruhl, Farms, Their Environmental Harms, and Environmental Law, 27 Ecology L.Q. 263, 308-09 (2000) (stating that, under "tremendous farm industry lobby pressure," Congress extended the implementation phase-out date for methyl bromide, a dangerous pesticide used on crops); Betsy Tao, A Stitch in Time: Addressing the Environmental, Health, and Animal Welfare Effects of China's Expanding Meat Industry, 15 GEO. INT'L ENV'T L. REV. 321, 349 (2003) (arguing that the weakening of U.S. anticruelty statutes through exemptions and lack of enforcement is due to the significant political power wielded by the American agricultural industry); Dena M. Jones & Sheila Hughes Rodriguez, Restricting the Use of Animal Traps in the United States: An Overview of Laws and Strategy, 9 ANIMAL L. 135, 152 (2003) (attributing the failure of federal anti-trapping legislation to the efforts of powerful lobby groups representing hunting, trapping, agricultural, and commercial fur interests).

²¹ "Ventilation shutdown" means sealing the building in which farmed animals are confined, shutting the inlets, and turning off the fans. AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS: 2019 EDITION, AM. VETERINARY MED. ASS'N (2019), https://www.avma.org/sites/default/files/resources/AVMA-Guidelines-for-the-Depopulation-of-Animals.pdf. The farmed animals' body heat raises the temperature in the building until they die from hyperthermia and hypoxia. *Id*.

²² "Water-based foam" means pumping foam into a building housing farmed animals in order to suffocate and drown them. Letter from Lloyd Doggett, U.S. House Representative, to Sonny Perdue, Secretary of Agric., U.S. Dep't of Agric., https:// doggett.house.gov/media/press-releases/avoiding-prolonged-death-animals-meatindustry.

²³ On fur farms, animals are often killed via anal or genital electrocution, to avoid damaging the fur. *See Animal Suffering in the Fur Trade*, HUMANE SOC'Y INT'L (Oct. 13, 2015), https://www.hsi.org/news-media/animal-suffering/.

²⁴ "Thoracic compression is the application of pressure to an animal's chest to prevent respiration and/or cardiac movements to cause death." *Welfare Implications of Thoracic Compression*, AM. VETERINARY MED. Ass'N (Oct. 11, 2011), https://www.avma.org/resources-tools/literature-reviews/welfare-implications-thoracic-compression.

²⁵ Male chicks are ground up alive or "macerated," as a standard industry practice. *See* Maryn McKena, *By 2020, Male Chicks May Avoid Death By Grinder*, NAT'L GEOGRAPHIC (June 13, 2016), https://www.nationalgeographic.com/culture/food/the-plate/2016/06/by-2020--male-chicks-could-avoid-death-by-grinder/.

¹² United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977).

live exsanguination,²⁶ force-feeding,²⁷ and starvation.²⁸ Thus, the anticruelty laws are "drafted in such a way as to make common (and cruel) agricultural practices acceptable, make enforcing the law impracticable, and render offenders immune from prosecution."²⁹

b. The Minimal Animal Welfare Protections and Related Regulations that Do Exist are Absurdly Interpreted, and Politically Undermined

In 1972, under pressure from the animal research industry, the Secretary of Agriculture excluded birds, mice, rats, and farmed animals from the definition of "animal" under the Animal Welfare Act, i.e. the vast majority of the animals we experiment on. ³⁰ The Animal Legal Defense Fund successfully challenged this exclusion on the merits in *ALDF v. Madigan* as the court found that the exclusion conflicted with the plain meaning of the statute since laboratory birds, mice, rats, and farmed animals all clearly fell within the statute's category of any "such other warm-blooded animal."³¹ When the judgment was vacated on the grounds that the plaintiff lacked standing, the Alternative Research and

²⁷ Foie gras production, for example, involves force feeding ducks by pinning them down and jamming a half-inch diameter, one-foot metal pipe down each duck's esophagus, resulting in livers over 10 times their normal size. *Ducks and Geese Are Tortured to Produce Foie Gras*, PETA U.K., https://www.peta.org.uk/features/ducksand-geese-are-tortured-to-produce-foie-gras/ (last visited Apr. 17, 2022). The process leaves ducks on the verge of death: bloated, panting, and barely able to walk from the diseased, distended liver pressing against their lungs. *Id*.

²⁸ Molting, for example, has traditionally been induced by withdrawing feed from four days to as long as two weeks. Recognizing the cruelty of this practice, the United Egg Producers guidelines now state that only non-feed-withdrawal molt methods—such as using specialized feed for non-producing hens and minimizing exposure to light—will be permitted for United Egg Producers (UEP) members. That being said, adherence to UEP guidelines is voluntary. *See* D. D. Bell, *Historical and Current Molting Practices in the U.S. Table Egg Industry*, 82 ANIM. Sci. J. 965, 968 (2003).

²⁹ Cassuto & O'Brien, *supra* note 5, at 10-12.

³⁰ Birds, mice, and rats represent more than ninety-five percent of the feeling creatures using in research facilities. "[It is] estimated as many as 100 million birds, rats and mice are also used and killed in research and for education each year." BRUCE A. WAGMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 506-07 (4th ed. 2010).

³¹ Animal Legal Def. Fund v. Madigan, 781 F. Supp. 797, 799 (D.D.C. 1992).

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Development Foundation challenged the exclusion,³² finally resulting in a settlement in 2000 where the USDA agreed to initiate a rulemaking procedure that included the regulation of rats, mice, and birds under the AWA. A victory nearly thirty years in the making proved illusory, however, when Congress intervened, passing an amendment to the 2002 federal "Farm Bill" that specifically excluded birds, mice and rats from the protections of the AWA.³³

Of course, this is not an isolated case of government agencies adopting nonsensical statutory interpretations in order to maximize the profits of animal industries. Consider, for example, the Twenty-Eight Hour Law,³⁴ where until 2006, the USDA interpreted the word "vehicle" in the statute not to include "trucks" thereby depriving billions of animals of the modest right of being let out of those vehicles transporting them to slaughter once every twenty-eight hours so that they could eat, drink, and exercise.³⁵ The Twenty-Eight-Hour law continues to be interpreted by the USDA to exclude chickens, though the law applies to all "animals."³⁶ Apparently, once again, "birds are not animals."³⁷

In California, a court held that Proposition 2, an animal welfare ballot initiative, actually *reduced* the legal protections for certain animals, in clear conflict with the voters' intent. ALDF had alleged that nursing mother pigs were placed in body-gripping "farrowing crates" for three weeks at the 2013 California State Fair, rendering them unable to walk, turn around, or stand comfortably in violation of California Penal Code 597t³⁸, which prohibited the confinement of any animal without adequate exercise. And yet, the court held that Proposition 2—which prohibited some forms of confinement but did not prohibit farrowing crates superseded 597t and the court dismissed the case on those grounds.³⁹

³³ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10301, 116 Stat. 491 (2002); 7 U.S.C. § 2132(g).

³⁶ The exclusion of chickens is particularly significant since chickens make up ninety percent of the animals transported and killed for food. *See* WAGMAN ET AL., *supra* note 30, at 420.

³⁷ See Clay v. New York Cent. R.R. Co., 231 N.Y.S. 424, 428 (N.Y. App. Div. 1928).

³⁸ Cal. Pen. Code § 597t.

³⁹ Hearing Today on Mistreated Mother Pigs at State Fair, ANIMAL LEGAL DEF. FUND (June 16, 2015), https://aldf.org/article/hearing-today-on-mistreated-mother-pigs-at-state-fair/.

²⁶ "The Scientific Panel of Animal Health and Welfare of the European Food Safety Authority concluded that exsanguination without stunning is inhumane and should not be used for slaughter." Yet this method remains in commercial use. Stephanie Yue, *An HSUS Report: The Welfare of Farmed Fish at Slaughter*, HUMANE Soc'Y OF THE U.S., https://www.humanesociety.org/sites/default/files/docs/hsusreport-animal-welfare-farmed-fish-at-slaughter.pdf (last visited Apr. 17, 2022).

³² See Animal Legal. Def. Fund v. Glickman, 204 F.3d 229 (2000) (holding that the plaintiff had standing because she was a college student who suffered a direct and personal injury from regularly observing the inhumane treatment of rats in laboratory experiments which she was obliged to participate in as part of the school's course requirements).

³⁴ 49 U.S.C. § 80502.

 $^{^{\}rm 35}\,$ The 28 Hour Law only applies to the transport of animals raised for food across state lines.

The California Department of Food and Agriculture (CDFA) similarly allowed industry to exploit a technical ambiguity in Proposition 2 by the denial of billions of egg-laying hens adequate space to "fully spread both wings without touching the side of an enclosure." While space to "fully spread both wings without touching the side of an enclosure" is a simple enough concept, and sufficiently specific to survive Constitutional scrutiny,⁴⁰ in practice, the lack of a numerical minimum space requirement allowed producers to legally avoid the additional space requirement.

A study commissioned by the CA Dept. of Food and Ag, "Determination of Space Use by Laying Hens," concluded that while an individual hen would require 322 square inches in compliance with Proposition 2's wing flapping requirement, as little as 90 square inches per hen might be sufficient in an enclosure holding 60 hens because "of the lack of clarity of the Proposition with respect to how many hens need to be able to simultaneously perform the particular behavior(s) listed."⁴¹ Yet the egg industry itself, in the lead-up to the passage of Proposition 2, concluded that "a reasonable interpretation of the practical effect of the language in the initiative is that each hen, whether caged or cage-free, would be required to have a minimum of 784 square inches of space (28×28) which is 5.4 square feet."⁴² In other words, a law that reasonably required at least 784 square inches of space for laving hens was entirely undercut by an unreasonable interpretation advanced by a governmentfunded study, and that is to say nothing of Section 597t, which on its terms already provided substantially more space than allotted under Proposition 2.

A decade later, voters passed Proposition 12 in a second attempt to provide incremental improvements in the lives of farmed animals, this time with a specific numerical requirement of 144 square inches until 2022, followed by cage free housing that will still allow hens to be confined by the thousands in sheds, spending their entire lives indoors (assuming the Legislature doesn't change its mind before then, as is allowed to under the statute without voter approval). In the three years since Proposition 12's passage, state officials have continued to miss deadlines for promulgating corresponding regulations, and a coalition of California restaurants and grocery stores have, in turn, filed suit to delay From Social Justice to Animal Liberation

the enforcement of the law as applied to pigs until those regulations are adopted.⁴³ The upshot is that after fourteen years, two ballot initiatives, and multiple lawsuits, laying hens in California will continue to be deprived of "space for adequate exercise,"⁴⁴ i.e. less than a reasonable interpretation of 597t would require, under a law whose enforcement remains in jeopardy.

c. Animal Law as a Misconception, and Aspiration

There are other reasons to question the nature of what we often call animal law: What we refer to as animal law is really human law that happens refer to animals, while excluding legal and practical protection for the vast majority of nonhumans, and designating the vast majority—wildlife—as property, quietly bundled into an anthropocentric concept of the environment as a human resource designated to absorb and be altered by things like greenhouse gas emissions.⁴⁵ That conception hurts animals,⁴⁶ having little to do with the fundamental and existential threat to nonhumans—our replacing them.⁴⁷

How might our thinking of "animal law" or other terms that imply a benefit to nonhumans have been different? Were, long ago, humans to have seen themselves as equal parts of a complex ecology rather than a dominant species capable of shaping the world to its needs, we would have been obligated—in family, food, land use, and dozens of other policy areas—to limit ourselves *existentially* to such just such an ecology.⁴⁸ That means smaller families, parenting delay

⁴⁵ See The Paris Agreement: What is the Paris Agreement?, U.N. CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last visited July 12, 2022); see also Carter Dillard, Earth Day 2022: Climate Reparations, Existential Justice, and Our Open Letter to Exxon, FAIR START MOVEMENT (Apr. 14, 2022), https://fairstartmovement.org/earth-day-2022-climate-reparations-existential-justice-and-our-open-letter-to-exxon/.

⁴⁶ See, e.g., Justin Marceau & Angela Fernandez, *Happy the Elephant: Lessons for the Future of Animal Rights Law*, SLATE (June 17, 2022, 9:32 AM), https:// slate.com/news-and-politics/2022/06/happy-the-elephant-lessons-for-the-future-of-animal-rights-law.html (discussing positive law as a form of misdirection).

⁴⁷ See Jane Marsh, *How Human Population Leads to Animal Extinction*, ENVIRONMENT (July 19, 2018), https://environment.co/how-overpopulation-leads-to-animal-extinction/.

⁴⁸ See Carter Dillard & Nandita Bajaj, Humane Families: Towards Existential

⁴⁰ Dan Flynn, *Appeals Court: CA's Proposition 2 Passes Constitutional Muster*, FOOD SAFETY NEWS (Feb. 5, 2015), http://www.foodsafetynews.com/2015/02/ language-used-in-sizing-laying-hen-cages-passes-constitutional-test/.

⁴¹ Joy A. Mench & Richard A. Blatchford, *Determination of Space Use by Laying Hens Using Kinematic Analysis*, 93(4) POULTRY SCI. 794, 794-98 (2014).

⁴² What the Ag Industry & UC Davis Say, U.S. HUMANE Soc'Y, http:// cagefreeca.com/what-they-say/what-the-ag-industry-uc-davis-say/ (last visited Feb. 11, 2021).

⁴³ See Scott McFetridge, *Will New Bacon Law Begin? California Grocers Seek Delay*, Associated PRESS (Dec. 12, 2021), https://www.usnews.com/news/business/articles/2021-12-12/will-new-bacon-law-begin-california-grocers-seek-delay.

⁴⁴ See Katie Crumpley, *How Cage-Free Egg Clwilderaims May Be Deceptive*, FACTORY FARMING AWARENESS COAL. (Nov. 18, 2021), https://ffacoalition.org/articles/ how-cage-free-egg-claims-may-be-deceptive/.

and readiness, and redistribution to wealth to incentivize these things and ensure equal empowerment of children.⁴⁹ Such a move would have required fundamentally challenging the anthropocentric nature of our legal systems, something many of the originators of the term "animal law" and other protective terms evaded doing. To the extent Peter Singer evaded these reforms with a misleading focus on farmed animals⁵⁰ rather than all future animals and future persons' relations with those animals⁵¹—as the majority for whom we should be concerned if we want to maximize impact, he played a large role in this misdirection. The climatological effects of that misdirection, alone, cannot be overstated, preventing family reforms that could have saved countless animal lives.⁵² But nothing is "animal law" or animal-benefitting—except in the thinnest and most useless of senses-if it does not orient from their (and hence our) biodiverse and life-giving world.53 In other words, there is no such thing as anthropocentric animal law, unless you want to disregard the function of law—to protect its subjects.⁵⁴ Thinking there is commits the common mistake of trying to magically separate humans from their language and ideation as well as the ecologies in which they live,⁵⁵ a mistake with massive consequences given the climate crisis.

The misnomer argument is true for conceptual reasons, in that a fundamentally ecocentric system necessitating smaller populations of prosocial persons would have maintained the capacity to be more reflective of its human subjects,⁵⁶ but also practical reasons—because

Justice and Freedom, REWILDING EARTH (Feb. 1, 2022), https://rewilding.org/humane-families-towards-existential-justice-and-freedom/.

⁴⁹ See Matthew Hamity et al., A Human Rights Approach to Planning Families, 49(3) Soc. CHANGE 469 (2019).

⁵⁰ See Peter Singer, Animal Liberation 7-18 (1973).

⁵¹ See Robert Wiblin, Toby Ord on Why the Long-Term Future of Humanity Matters More than Anything Else, and What We Should Do About It, 80,000 Hours (Sept. 6, 2017), https://80000hours.org/podcast/episodes/why-the-long-run-futurematters-more-than-anything-else-and-what-we-should-do-about-it/.

⁵² See Craig K. Chandler, *How Family Size Shapes Your Carbon Footprint*, YALE CLIMATE CONNECTIONS (Mar. 29, 2019), https://yaleclimateconnections. org/2019/03/how-family-size-shapes-your-carbon-footprint/.

⁵³ An Enduring American Heritage: A Substantive Due Process Right to Public Wild Lands, 51 E.L.R. 10026 (2021), https://fairstartmovement.org/wp-content/uploads/2021/02/51.10026.pdf.

⁵⁴ See Damian Carrington, Global Heating Linked to Early Birth and Damage to Babies' Health, Scientists Find, THE GUARDIAN (Jan. 15, 2022), https:// www.theguardian.com/environment/2022/jan/15/global-heating-linked-early-birth-damage-babies-health; see also Abigail E. Cahill et al., How Does Climate Change Cause Extinction?, ROYAL SOC'Y (Oct. 17, 2012), https://royalsociety.org/news/2012/ climate-change-extinction/.

⁵⁵ Dillard & Bajaj, *supra* note 48.

⁵⁶ See Gregory Michener et al., *The Remoteness of Democratic Representation*, PARTY POLITICS (2021); *see also* Carter Dillard, *Empathy with Animals: A Litmus Test* requiring our systems to be actually inclusive of its subjects so that they can meaningfully participate, and hence ecocentric rather than anthropocentric, would have avoided much of the climate crisis which now threatens the system such "law" was meant to protect.⁵⁷ Surely there is no concept of law, including positivism, that would not require its obligations to actually relate to and ideally reflect the inclinations of its subjects, something dependent on their actuality, their quantities and qualities.⁵⁸

The pathway forward is to treat an ecocentric future, and democracy where the average person maintains the quantitative and qualitative capacity to actually have an impact on the outcomes,⁵⁹ as the precondition for the legitimacy of any norms and to alter rights and obligations accordingly. This starts with family law and policy oriented around deep ecology and equity, as a pathway towards true animal law and protection.⁶⁰ This answers the otherwise open question left by many theorists,⁶¹ of who the people should be that will actually carry animal-benefitting theories into action.

That pathway is animal protection in the most comprehensive sense because it actually includes the full biodiversity of nonhumans, as well as the future persons with whom they would interact. This is a pathway that could be bricked by an untold number of activists creating compelling narratives about the next big social movement, bottom up, limiting and decentralizing human power, rather than simply waiting for institutional change to come from the top down.⁶²

for Legal Personhood?, 19 ANIMAL L. 1, 20–21 (2012); Joseph Raz, *The Social Thesis and the Sources Thesis, in* The Quest for the Description of the Law 27, 27-28 (2009).

⁵⁷ See William Brangham et al., UN Releases Dire Climate Report Highlighting Rapid Environmental Degregation, PBS NEWSHOUR (Feb. 28, 2022, 6:35 PM), https://www.pbs.org/newshour/show/un-releases-dire-climate-reporthighlighting-rapid-environmental-degradation.

⁵⁸ Id.

⁵⁹ See Human Rights and Democracy, FAIR START MOVEMENT, https:// fairstartmovement.org/human-rights-democracy/ (last visited July 12, 2022); Carter Dillard, *A Simple Litmus Test for Democracy and Freedom*, 18(5) J. OF SOLIDARITY & SUSTAINABILITY (2022), http://www.pelicanweb.org/solisustv18n05page8.html.

⁶⁰ See Dillard, supra note 45; see also Phil Cafaro, What is the Optimal Human Population? An Eminent Economist Weighs In, OVERPOPULATION PROJECT (Mar. 8, 2021), https://overpopulation-project.com/what-is-the-optimal-human-population-an-eminent-economist-weighs-in/.

⁶¹ See generally Will Kymlicka & Sue Donaldson, Zoopolis: A Political Theory of Animal Rights (Oxford Univ. Press 2011).

⁶² See Marina Bolotnikova, *Why the Anti-Factory Farming Movement Needs Direct Action*, CURRENT AFFAIRS (Mar. 14, 2022), https://www.currentaffairs. org/2022/03/why-the-anti-factory-farming-movement-needs-direct-action.

II. CULTIVATING TRANSGENERATIONAL EMPATHY FOR ANIMALS AND HUMANS ALIKE

Recognizing that animal law in its current form is a misnomer, that animal rights and human rights are interdependent, and that the greatest potential for reducing suffering lies in a focus on long-term outcomes, this Article calls for the pursuit of policies that cultivate transgenerational empathy.

a. Why Focus on Human and Nonhuman Animals Alike?

Any discussion of the "law as misnomer" must recognize that systematic, legalized exploitation of the most vulnerable by the legal and political systems is obviously not unique to nonhuman animals. And seeing as the oppression of vulnerable human beings by the most powerful institutions, and corporations in particular,⁶³ proliferates to this day, human rights advocates are wont to question why anyone would focus their energies on bettering the lives of nonhuman animals.⁶⁴ Empathy, however, is not a zero sum game; empathy for nonhuman animals begets empathy for vulnerable human beings, and vice versa.

Recently, increasing awareness of the interconnectedness of human, animal and ecosystem health has led to an integrative One Welfare approach. As the Islamabad High Court noted in the case of Kaavan the elephant, it is "obvious that neglect of the welfare, wellbeing of the animal species, or any treatment of an animal that subjects it to unnecessary pain or suffering, has implications for the right to life of humans."⁶⁵ Court concludes that any violation constitutes an "infringement of the right to life of humans."⁶⁶

In particular, studies have found that ethical vegetarians and vegans have higher levels of empathy for humans and animals alike.⁶⁷ Humane education programs, for example, have "not only enhanced children's attitudes towards animals…but this change generalized to

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a measure of human-directed empathy."⁶⁸ Nor is this a new idea, with the father of the American public school system, Horace Mann, having emphasized the importance of compassion for animals as a precursor to human generosity: "From the youthful benevolence that rejoices to see an animal happy, one grows up into a world-wide benefactor, into the healer of diseases, the restorer of sight to the blind, the giver of a tongue to the dumb, the founder of hospitals."⁶⁹

By the same token, since our levels of empathy are largely contingent on the conditions in which we are born and raised,⁷⁰ children provided with the resources needed to thrive are more likely to be kind to the most vulnerable among us, both two and four-legged.⁷¹ As one animal and child welfare scholar notes:

The introduction of new humans into the world matters to its nonhuman inhabitants. It matters both in terms of how many new humans come into the world, and who those new humans are: In particular, their propensity to eat, wear, experiment upon, hunt, torture, and occupy the habitats of nonhumans. To the extent those humans are not aware of, cannot understand, or do not comply with the norms that purport to control how they treat animals, the introduction of new humans into the world-- and who those humans are and will become--is what matters most of all.⁷²

The right of wildlife to thrive is also interdependent with the right of future generations of humans to thrive. Obviously, wildlife requires food, water, cover, and space to survive. In the truest sense, future generations depend on these same "life requirements" to survive. This interdependence has become more readily apparent during the pandemic: the scientific community has repeatedly stressed, conserving biodiversity while reducing contact with humans can limit the spread

⁶³ See, e.g., Tomasella v. Nestle USA, Inc., 962 F.3d 60 (1st Cir. 2020).

⁶⁴ See Natalie Proulx, *Is It Wrong to Focus on Animal Welfare When Humans Are Suffering*?, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/ learning/is-it-wrong-to-focus-on-animal-welfare-when-humans-are-suffering.html.

⁶⁵ Saskia Stucki & Tom Sparks, *The Elephant in the (Court)Room: Interdependence of Human and Animal Rights in the Anthropocene*, BLOG OF THE EUR. J. OF INT'L L. (June 9, 2020), https://www.ejiltalk.org/the-elephant-in-the-courtroominterdependence-of-human-and-animal-rights-in-the-anthropocene/.

⁶⁶ Id.

⁶⁷ See generally Massimo Filippi et al., *The Brain Functional Networks* Associated to Human and Animal Suffering Differ among Omnivores, Vegetarians and Vegans, 5 PLOS ONE 1, 1-9 (May 2010) (discussing brain responses to conditions of animal and human suffering between omnivores, vegetarians, and vegans).

⁶⁸ Frank R. Ascione, *Children Who Are Cruel to Animals: A Review of Research and Implications for Developmental Psychopathology*, 6 ANTHROZOOS 226, 234 (1993).

⁶⁹ Horace Mann, Twelve Sermons: Delivered at Antioch College 121 (Kessinger Publ'g 2010).

⁷⁰ Nancy Eisenberg et al., *Prosocial Development*, in 2 THE OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY: SELF AND OTHER 1 (Philip David Zelazo ed., 2013).

⁷¹ See generally Carter Dillard, *Comprehensive Animal Rights*, FAIR START MOVEMENT (Mar. 15, 2022), https://fairstartmovement.org/comprehensive-animal-rights/ (discussing the ways in which family planning is logically intertwined with animal rights).

⁷² Dillard, *supra* note 56, at 20-21.

of pathogens that cause infectious diseases like COVID-19.⁷³ When we convert wilderness for industrialized exploitation, the plants and animals that survive are more likely to carry disease, their populations flourishing without predators and competitors.⁷⁴

b. Why Transgenerational Empathy?

Focus on the cultivation of long-term, transgenerational empathy is largely a matter of necessity. That is, the kind of value change proposed by this Article requires decades, if not centuries to achieve, since societal values tend to be stable. By the same token, once society comes to better respect the rights of vulnerable humans and animals, that is likely to be a long-lasting change.

Second, there's the matter of sheer numbers: there will be far more animals (human and nonhuman) in future generations than exist today.⁷⁵

Finally, protecting future generations has long been underemphasized as a matter of law and policy. After all, "Future generations matter, but they can't vote, they can't buy things, they can't stand up for their interests."⁷⁶ In this way, future generations are, by definition, a voiceless group in need of protection.⁷⁷

c. Policies to Promote Transgenerational Empathy

Empathy with, and/or prosocial behavior towards, vulnerable entities like nonhumans and future children necessarily entails ensuring future children, minimum levels of wellbeing, equitable positions relative to other persons, safe/healthy/natural environments, and civic capacities and effective voices in their democracies—the things that would free them from others. Ensuring these things, in turn, liberate nonhumans by creating smaller human families that would invest more in each child (including in the development of their empathy) and do so equitably. It's existential justice, for humans and nonhumans alike.⁷⁸ From Social Justice to Animal Liberation

The hallmark of "constituting"⁷⁹ future generations in ways where humans and nonhumans experience relative autonomy or the capacity for self-determination in a way that is aligned involves the physical limitation and decentralization of power through family planning reforms.

Assuming the nation in question is a human rights-based democracy, the state's interest in future persons is in ensuring all children a fair start in life and thus the creation and eventual emancipation of persons with the mutual capacity to be relatively self-determining.

To ensure that capacity we would have to start at some border of human influence, or nature/nonpolity—the nonhuman world, and maintain a neutral position so that as any particular group of persons grows the capacity for self-determination gives way (or is directly inverse) to the capacity for determination by others. To maintain the neutral position, at a certain range, the group in question has to divide. Knowing and acting according to that inversion is proof that people are free and equal, or that they matter politically, because their capacity to equally self and other determine is recognized.

For example, we would need to change family planning policies to minimize the impact climate related heat rises have on infants and their self-determination.⁸⁰ We would have to ensure smaller families creating less emissions, in which each child had health care sufficient to mitigate the harm—perhaps by targeting those responsible for the crisis to pay for family planning incentives/entitlements and care. And those children would have to be raised capable of eventually constituting autonomous political units, if they chose to do so, the sort where people are empowered to prevent crises like the climate crisis from occurring in the future.⁸¹

The simplest analogy for such groups of truly, but relatively, self-determining people would be the notion of functional constitutional conventions convening in a sea biodiverse nature, whose numbers are pegged to historic representative ratios such that voices are meant to matter.⁸² This vision reflects the fact that the ultimate orders of human power are not lines on a map, but bodies and their influence. Not limiting the right to have children to account for this interest, or the interests of the future child, is like a room full of people where not all are permitted to speak. Those speaking feel free to do what they like, but the total quantity of autonomy is reduced.

⁷³ Natasha Gilbert, *More Species Means Less Disease*, NATURE (Dec. 1, 2010), https://www.nature.com/ news/2010/101201/full/news.2010.644.html.

⁷⁴ Felicia Keesing et al., *Impacts of Biodiversity on the Emergence and Transmission of Infectious Diseases*, 468 NATURE 647, 652 (2010).

⁷⁵ See Benjamin Todd, Which Problems in the World are the Most Pressing to Solve?, 80,000 HOURS (Mar. 2017), https://80000hours.org/career-guide/world-problems/.

⁷⁶ Id.

⁷⁷ See generally JOEL FEINBERG, THE RIGHTS OF ANIMALS AND UNBORN GENERATIONS (Routledge, 1st ed. 2012).

⁷⁸ See generally id.

⁷⁹ See Carter Dillard, Constituting Over Constitutions, 6 U. BOLOGNA L. REV. 48, 48 (2021).

⁸⁰ See Colin D. Butler et al., *Climate Change and Human Health, in* SUSTAINABILITY AND THE NEW ECONOMICS 51, 51-68 (2022).

⁸¹ See Dillard, *supra* note 56, at 20.

⁸² See Michener et al., supra note 56.

There are no obligations that precede the obligation to maintain this neutral position—in other words, the obligation to ensure all children ecosocial fair starts in life. A system is fair and obligatory when it goes all the way back—or fully accounts for its power. We are skipping a crucial step if we don't do this. And adhering to obligations, like honoring government issued property rights to wealth before using that wealth to create people in a fair way, would thus be being dishonest.⁸³ The owners of that wealth would have never paid the price of freedom in terms of orienting from a system of relatively self-determining people capable of setting the rules that then set market costs and benefits. Such people never come from a just place by fully accounting for the power of the system in which they live. In other words, maintaining ourselves as a consensual "We the People," which is contingent on procreation (which acts almost as a first election of the ultimate source of political authority-the people) in a unique way, precedes the list of rights "we" might enjoy.

More specifically, this process involves redistributing wealth, and with it power, to ensure ecosocial fair starts in life for every child through devices like universal "small family" policies, significant baby bonds that could be used to incentivize fertility delay and parental readiness,. This would enable equitable investment in future generations. This is feasible, based on research regarding the efficacy of family planning incentives,⁸⁴ and would have a substantial impact on animal welfare—reductions in total fertility and all of the impacts it has on the nonhuman world aside—by closing the massive gap between rich and poor that exists today.

Per a recent study "[i]n a country with large GDP but high-income inequality, a sizeable part of the population may struggle to meet such basic demands for life satisfaction, which would diminish overall public demand for stricter animal protection policies."⁸⁵ This maximizes both freedom from others, and freedom to equitable and morally valuable ⁸⁶ options in life, via a new peremptory creation norm.

This process of normal change around family planning entails a fairly clear pathway in law and policy, one that branches into institutional reforms, cultural (or social learning)⁸⁷ and direct action moves as well.

It begins, not surprisingly, with revisions of erroneous soft law interpretations of the right to have children based on various provisions of the International Bill of Human Rights.⁸⁸ Those interpretations, ostensibly to prop up population growth-based economies in the late 20th Century, read the right as protecting unlimited choice for would-be parents to choose the timing, spacing, and number of children, instead of a future child-centric focus that cooperatively ensured parental readiness, smaller and more sustainable families, and a fair start in life for all kids.⁸⁹ The actual revision could start with informal statements by United Nations Secretary General on the need for reform. This is so given that the current model was adopted before the advent of the climate and other ecological crises, unprecedented levels of global inequality, new threats to what were assumed to be stable examples of human rights and democracy, and the Covid-19 pandemic.

That statement, and process of soft law revisions probably culminating in a more formal revision at the next world population conference,⁹⁰ could link to the simultaneous embracing of fair start family planning reforms by leadership at the United Nations Population Fund,Children's Convention governing bodies, and at the World Health Organization. The latter is especially crucial given the relationship between overcrowding, growth, the spread and impact of disease, and the exacerbated conditions that will cause the next pandemic.⁹¹

Within nations, the change could come through specialized legislation, both at the national and state and local level. Change through specialized legislation has four aspects. First, it shifts child care payments, child tax credits, baby bonds or comparable guaranteed minimum income schemes, and similar devices towards family planning incentives⁹² that promote parental readiness,⁹³ minimum standards of welfare approaching equitable birth positioning, and a universal ethic of smaller and more sustainable families. Secondly, it links this programming to environmental reforms, like the proposed Green New Deal.⁹⁴ Thirdly, the shift also links the family planning

⁹⁰ See J. Nalubega Ross, Chapter One and Chapter Two from "Program of Action of the International Conference on Population and Development" (1994), by United Nations Population Fund, EMBRYO PROJECT ENCYCLOPEDIA (Jan. 15, 2021), https://embryo.asu.edu/pages/chapter-one-and-chapter-two-program-actioninternational-conference-population-and-development.

⁹¹ See Anne McNicholas et al., Overcrowding and Infectious Diseases— When will We Learn the Lessons of our Past?, 113 N.Z. MED. J. 453 (2000).

⁹² See Dillard, supra note 56, at 20.

⁹³ See Matthew Hamity, *The Human Right to a Fair Start in Life*, 7 CHILD & FAM. L.J. 109, 109 (2019).

⁹⁴ See Riccardo Mastini et al., A Green New Deal Without Growth?, 179 ECOLOGICAL ECON. 1, 2 (2021).

⁸³ See Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice (2002).

⁸⁴ See generally Sarah Bexell et al., *How Subsidizing Delayed Parenthood Will Let Children Lead the Way to a Fairer World*, 51 Loy. U. CHI. L.J. 1 (2020).

⁸⁵ Michael C. Morris, *Improved Nonhuman Animal Welfare Is Related More to Income Equality Than It Is to Income*, 16(3) J. of Applied ANIMAL WELFARE Sci. 272, 272-93 (2013).

⁸⁶ See generally JOSEPH RAZ, THE MORTALITY OF FREEDOM (1986).

⁸⁷ See Albert Bandura, *The Evolution of Social Cognitive Theory*, *in* Great Minds in Management: The Process of Theory Development 9 (2005).

⁸⁸ See Dillard, supra note 56, at 21.

⁸⁹ Id.

reforms to education policy, incentivizing planning that aligns with early childhood development and educational outcomes. Fourthly, the incentives are linked to the availability and subsidization of new contraceptives, (especially male contraceptives), and programming that includes default for use by all persons under specified ages.⁹⁵

Beyond legislation, there are a variety of strategic impact litigation opportunities, such as the case pending before the Ninth Circuit described above. There is also imminent litigation challenging abortion bans based on the fair start rights of future generations,⁹⁶ challenges to National Environmental Policy Act regulations that blatantly failed to implement the Act's prioritization of population stabilization, ⁹⁷ and using the legislation above to draw defensive challenges that will clarify *Skinner v. Oklahoma* and other key precedents.

Turning to institutional reform, both for-profit and non-profit institutions can shift toward supporting fair start family planning in their programming, and many, choosing to do the right thing, have edged towards doing so.⁹⁸ For those that have not, obstacles have been that public messaging from a variety of institutions, from socially conscious investment funds, companies reliant on their public goodwill, to massive charities who have made claims for years regarding the socially beneficial impact of their work, have in fact been misleading. Public messaging consistently omitted material information about the offsetting impacts of population growth on the efficacy of programming (most of which had no family planning elements). In some cases, these messages- many of which were used in fundraising campaigns-were blatantly false. This process enabled climate change denial and blocked reforms that could have been done years ago. Work in this area can be combined with campaigns urging divestment from industries lobbying for unsustainable pronatal policies and industries that are engaged in supporting public narratives about baby busts and underpopulation.⁹⁹ This can be done concurrently with investments in private funds that promote sustainable and equitable family planning that invest more in each child to produce long-run returns.

A more cultural level, following the social cognitive theory work of Albert Bandura,¹⁰⁰ public influencers, and role models can be urged

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to step forward to promote and, in some cases, model fair start family planning. While several families have done so,¹⁰¹ and some prominent persons have moved their messaging in this direction,¹⁰² we have yet to see truly prominent icons break the taboo (ironically reinforced by static, short-run social justice movements) that surrounds family planning discussions.

At a more of a grassroots level, there are opportunities for smaller and more sustainable families to lead as a force for change, given the way pronatal policies discriminate against them and their children.¹⁰³ And finally, given that fair start is rightly treated as a peremptory norm—and perhaps *the* peremptory norm—there are a variety of civil disobedience and direct action tactics that would demonstrate the overriding nature of the claim. These include demonstrating its supremacy over existing property rights, especially the rights of those particular and culpable entities at the top of the economic pyramid whose wealth would have the greatest impact on furthering fair start reforms were it shifted to support them.¹⁰⁴

III. ANIMAL LAW AND SOCIAL JUSTICE IN THE SHORT-TERM

Given that long-term value change takes decades, if not centuries, animal advocates would be well advised to continue to push for reforms in the here and now that will lay the groundwork for more radical action in the future, while simultaneously transitioning animal advocacy toward a modern social justice movement.

a. Circumventing Industry-Captured State Bodies Through Democratic Engagement

By solely targeting corporate perpetrators of animal cruelty (as opposed to individual workers), and seeking justice through citizens rather than police and prosecutors, the movement may more easily transition to a social justice movement that speaks truth to power, while also better protecting the rights and welfare of billions of animals.

⁹⁵ See Mark Hathaway et al., *Increasing LARC Utilization: Any Woman, Any Place, Any Time*, 57 CLINICAL OBSTETRICS & GYNECOLOGY 718, 718-28 (2014).

⁹⁶ Carter Dillard, *Ready for Something Different? Fair Start Concept Changes Everything*, FAIR START MOVEMENT (Mar. 15, 2022), https://fairstartmovement.org/ texas-abortion-fight-a-new-way-forward/.

⁹⁷ See 42 U.S.C. § 4321(1970).

⁹⁸ See Sustainable Families: Surviving and Even Thriving During COVID-19, FAIR START MOVEMENT (Mar. 22. 2022), https://havingkids.org/tag/huggable/.

⁹⁹ See id.

¹⁰⁰ See generally Bandura, supra note 87.

¹⁰¹ See The Model Up Close, FAIR START MOVEMENT, https://havingkids.org/ featuredfamilies/ (last visited April 7, 2022).

¹⁰² See, e.g., Ashley Berke, *Kate Middleton Speaks for Children's Rights to Equal Starts in Life*, FAIR START MOVEMENT (Dec. 28, 2020), https://fairstartmovement. org/kate-middleton-speaks-out-for-all-childrens-right-to-an-equal-start-in-life-take-action/.

¹⁰³ See Are Small Families Subsidizing Larger and Less Sustainable Ones? Tell Us Your Story, FAIR START MOVEMENT (Mar. 15, 2022), https://fairstartmovement. org/are-subtle-funding-policies-hurting-your-familys-future/.

¹⁰⁴ *See* Dillard, *supra* note 96, at 70-71, 73.

i. Protections for Vulnerable Workers in Animal Industries

In a recent lawsuit by Animal Rescue and Protection League, advocates allege that Hudson Valley Foie Gras "violate[s] state and federal labor laws in their exploitation and abuse of migrant farmworkers, including sexual abuse and molestation of female workers by managers at HVFG's farm, where hundreds of the migrants live in squalid conditions."¹⁰⁵ Per the complaint: The New York State Senate official YouTube channel has the following video of former Senator Pedro Espada visiting HVFG on September 15, 2009.¹⁰⁶ In the beginning of the video, a female worker describes the sexual abuse perpetrated by her bosses at HVFG.¹⁰⁷ At 2:20 in the video, a local priest describes how owners Ginor and Yanay fired all the migrant farmworkers and brought in new ones when they complained about illegally low wages and other labor violations.¹⁰⁸ The workers had nowhere to go, and the local church had to house them in their basement. At 8:40, Senator Espada confronts HVFG manager Marcus Henley directly about the sexual abuse of workers occurring at HVFG.¹⁰⁹ Henley responds by calling the police and screaming at Senator Espada to leave HVFG's property.¹¹⁰ New York Times Op-Ed Columnist Bob Herbert wrote a column on June 8, 2009 called "State of Shame," describing the horrific working conditions of the migrant workers at HVFG.111

Recognizing the overlapping interests of vulnerable and oppressed workers at factory farms with the abused animals at farms, it becomes obvious that undercover investigations that result in animal cruelty charges against a few workers, rather than the corporation and its executives, are simultaneously ineffective and unjust.¹¹²

Admittedly, advocacy for workers in animal industries can be complicated by the fact that animal lawyers seek to hold their bosses accountable, which could then lead to reduced profits and job loss. It is important that animal advocates continue to invest time and resources

¹¹² See generally Justin Marceau, Beyond Cages: Animal Law and Criminal Punishment (2019).

into further development of efforts, like the Rancher Advocacy Program, which helps meat and dairy operations transition into ethical vegan operations.¹¹³ Much like the Green New Deal aims to create new green jobs to compensate for the transition away from fossil fuels, animal advocates should prepare a Humane New Deal campaign. While the specifics of such a campaign are beyond the scope of this article, it stands to reason that the burgeoning market for "clean meat" and plant-based alternatives would create new opportunities for workers previously employed in the animal industries. Given the mammoth size of the animal industries, replacing those jobs would not happen overnight, but the converse is true as well: the elimination of these industries will be a slow process, requiring decades to be sure.

ii. Eliminate Exemptions for Standardized Industry Cruelty and Create Private Civil Rights of Action under the Cruelty Law via Ballot Initiatives

In the face of pervasive corporate capture of agencies, legislators, and prosecutors by the animal torturing industries,¹¹⁴ animal advocacy organizations may have felt compelled early in the movement to make a "deal with the devil," focusing instead on the lower hanging fruit of harsher punishments of individual abusers of companion animals. As Professor Justin Marceau notes, "a full one-third of the states with exemptions for factory farming practices enacted these exemptions in conjunction with passing their felony [animal cruelty] laws."¹¹⁵

The time has come to right that wrong by shifting the focus away from individual offenders, and instead targeting standardized, corporate cruelty via repeal of the statutory exemptions. While it is true that standardized, corporate cruelty is treated as impliedly exempt by prosecutors even in those states without explicit statutory exemptions,¹¹⁶

¹⁰⁵ First Amended Verified Complaint at 16, Animal Prot. & Rescue League, Inc. v. Ginor, No. 20STCV34229 (Cal. Super. Ct. Sept. 16, 2020), https://www.bryanpease. com/ginor?fbclid=IwAR3etexKQ0jCWuwQer0p-D7usHiuPkPR8K2vWVQQkqrS-bxcbY_8psWlSEI.

¹⁰⁶ N.Y. Senate, *Senator Espada Talks to Farm Workers on a Duck Farm*, YOUTUBE (Sept. 15, 2009), https://www.youtube.com/watch?v=qUOPYu8NNug.

¹⁰⁷ *Id*.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ¹¹⁰ *Id.*

III Id.

¹¹¹ Bob Herbert, *State of Shame*, N.Y. TIMES (June 8, 2009), https://www.nytimes.com/2009/06/09/opinion/09herbert.html.

¹¹³ *Home Page*, RANCHER ADVOCACY PROGRAM, https://rancheradvocacy.org/ (last visited July 12, 2022).

¹¹⁴ See Drutman, supra, note 19.

¹¹⁵ MARCEAU, *supra* note 112, at 104.

¹¹⁶ Minnesota, for example, provides no statutory exemptions to its anticruelty laws; as in New York, the word "unjustifiable," does all the work of immunizing standard industry practices in Minnesota, with prosecutors presuming that standard industry practices are *ipso facto* "justifiable." *See* MINN. STAT. § 343.21. "No person shall overdrive, overload, torture, cruelly beat, neglect, or unjustifiably injure, maim, mutilate, or kill any animal."). Additionally, Mississippi, has no statutory exemptions to its animal cruelty laws, with qualifiers such as "unjustifiably," "cruelly," and "needlessly," apparently immunizing the standard industry practices. MISS. CODE ANN. § 97-41-1 ("if any person shall intentionally or with criminal negligence override, overdrive, overload, torture, *torment, unjustifiably injure, deprive of necessary sustenance, food, or drink; or cruelly beat or needlessly mutilate; or cause or procure

eliminating statutory exemptions for standardized cruelty allows for the cultivation of a new legal and moral baseline, where the burden shifts to the industry to prove a particular practice "un-cruel," in both the normative and legal senses. *Conversely, providing an explicit statutory exemption has ceded the definition of animal cruelty entirely to industry, i.e. the very perpetrator of said cruelty.* In the United Kingdom, a court specifically rejected that approach because "t]o do so would be to hand the decision as to what is cruel to the food industry completely, moved as it must be by economic as well as animal welfare considerations."117 When McDonald's sued English animal advocates for defamation after the advocates accused the corporation of animal cruelty and torture, the Court concluded that, "McDonald's [was] responsible for torture and murder." The Court added that "[0]f course the commercial urge to rear and slaughter as many animals as economically and therefore quickly as possible may lead to cruel practices...which could be avoided if less attention was paid to profit and high production and more to animals."¹¹⁸ In the U.S., McDonald's could simply have pointed to the various statutory exemptions for standard factory farming practices, making their defamation case substantially stronger.

Currently, a ballot initiative in Oregon ("IP 13") is underway for the 2024 election that proposes repealing Oregon's statutory exemptions to the anti-cruelty laws for, "[a]ny practice of good animal husbandry[;]" "[t]he treatment of livestock being transported by owner or common carrier;" "[a]nimals involved in rodeos or similar exhibitions;" "[c]ommercially grown poultry;" "[t]he killing of livestock according to the provisions of ORS 603.065 (Slaughter methods);" "[l]awful fishing, hunting and trapping activities; ... [w]ildlife management practices under color of law;" "[l]awful scientific or agricultural research or teaching that involves the use of animals; ... [r]easonable activities undertaken in connection with the control of vermin or pests; and ... [r]easonable handling and training techniques."¹¹⁹

Under Oregon's initiative petition process, IP 13 organizers must gather the 112,020 signatures needed to get the initiative onto

¹¹⁹ David Andrew Michelson, *Abuse, Neglect, and Assault Exemption Modification and Improvement Act*, OR. SEC'Y STATE ELECTIONS DIV., https:// egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20220013.. LSCYYYABUSE,_NEGLECT,_AND_ASSAULT_EXEMPTION____ MODIFICATION_AND_IMPROVEMENT_ACT (last visited April 4, 2022) (providing the ballot initiative was withdrawn on March 28, 2022). the November 2024 ballot.¹²⁰ Should the initiative pass, the cruelty law would prove far more difficult for prosecutors to treat as having implied exemptions than in New York, Minnesota, and Mississippi, as the Oregon statute lacks any qualifiers along the lines of "*unjustifiably* injury," or "*maliciously* kill,"; rather "intentionally caus[ing] physical injury to an animal" is sufficient.¹²¹ The language of a previous version of the ballot initiative (since withdrawn) was recently amended *at the urging of the animal industries* to specify that its enactment would criminalize "killing for food, hunting, fishing."¹²² Industry groups sought the change to emphasize the wide-ranging effects of the initiative in the hopes of deterring signers. Ironically, however, the clarifying language will make it next to impossible for prosecutors and courts to find the intent of the bill was not to criminalize standard industry practices.¹²³

Unfortunately, even if the initiative passes, Oregon is highly unlikely to become a "sanctuary state for animals," as author of the initiative, David Michelson hopes.¹²⁴ The Oregon legislature could seek to overturn the initiative, as occurred in Missouri after voters passed an initiative banning puppy mills.¹²⁵ And indeed, Oregon is one of eleven states in which the Legislature may repeal a voter initiative by simple majority.¹²⁶ While proponents of the initiative may take solace in in a 2010 survey that found 89% of Oregon legislators disagreed that "Legislators should feel free to displace content and try to move policy outcomes closer to ones they prefer,"¹²⁷ legislators may feel differently toward a bill with this kind of impact on animal exploiting industries.

In Colorado, activists proposed a more narrow ballot initiative, which would have eliminated statutory exemptions for animal agriculture standard practices, while leaving the exemptions for research and pest and predator control intact.¹²⁸ The initiative would have mandated the

¹²⁴ Jeff Rice, *Anti-Livestock Initiative Petitions Now Circulating in Oregon*, J.-ADVOC. (May 4, 2021), https://www.journal-advocate.com/2021/04/30/anti-livestock-initiative-petitions-now-circulating-in-oregon/.

¹²⁵ When Missouri voters passed a ban on puppy mills, Missouri legislators promptly overturned the voter initiated ban. *See* Associated Press, *Missouri Legislators Undo Puppy Mill Law*, WASH. TIMES (Apr. 14, 2011), http://www.washingtontimes. com/news/2011/apr/14/missouri-legislators-undo-puppy-mill-law/.

¹²⁶ Kathleen Ferraiolo, *State Legislative Response to Direct Democracy and the Politics of Partial Compliance*, AM. REV. OF POL. 31, 41-64 (2010).

¹²⁸ See Colorado State Ballot Initiative, Protect Animals from Unnecessary Suffering and Exploitation, COLO. SEC'Y OF STATE (Feb. 22, 2021, 12:40 PM), https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2021-2022/16OriginalFinal.pdf.

to be overridden, overdriven, overloaded, tortured, unjustifiably injured, tormented, or deprived of necessary sustenance, food or drink.").

¹¹⁷ Chief Justice Bell, *The Verdict Section 8: The Rearing and Slaughtering of Animals*, McSpotLight (Oct. 18, 2003), https://www.mcspotlight.org/case/trial/verdict/verdict8_sum.html.

¹¹⁸ *Id*.

¹²⁰ Id.

¹²¹ Id.

¹²² *Id.*

¹²³ Id.

¹²⁷ Id.

slaughtering of farmed animals only occur if an animal had lived a quarter of its natural lifespan, as well as redefined what constituted a "sexual act with an animal," to include artificial insemination.¹²⁹ However, the Colorado Supreme Court rejected the measure, finding that it violated the State's "single subject" requirement, because "expanding the definition of 'sexual act with an animal' isn't necessarily and properly connected to the measure's central focus of incorporating livestock into the animal cruelty statutes."¹³⁰ Colorado's Democratic governor, Jared Polis, came out in opposition to the initiative, stating he "stands in solidarity with Colorado farmers and ranchers in opposition to the PAUSE ballot initiative because it would hurt Colorado and destroy jobs."¹³¹ It is now up to the proponents of the initiative to decide whether to revise the title in keeping with the Court's holding. Should the initiative ultimately pass, the Legislature may repeal it by majority vote, much like Oregon.

Even if the Colorado or Oregon initiative passes and is not repealed by the Legislature, enforcement of the laws will face key obstacles. That is, while the initiatives may be clear in their criminalization of categories of standard industry practices, prosecutors would still have the discretion to not enforce the law, much as California prosecutors did not do so in the case of California's 597t minimum exercise requirement, and as prosecutors in Minnesota do not enforce its similar requirement that "[n]o person shall keep any cow or other animal in any enclosure without providing wholesome exercise and change of air."¹³² Additionally, Oregon's ban on animal slaughter could potentially be preempted by the Federal Meat Inspection Act.¹³³

The preliminary lessons, then, from Oregon's IP 13 and Colorado's Initiative 16, are that advocates should (1) seek passage of the initiative in a state that does not allow the Legislature to repeal initiatives, such as California and Washington, and (2) include a private right of action as part of the initiative, thereby circumventing industry-captured prosecutors.

That the country is far from ready for legislation as far-reaching as Oregon's IP 13 and Colorado's Initiative 16 is underscored by the fact that no national animal advocacy organizations have come out in support of either one.¹³⁴ This may be due to fear that the bill is too extreme, driving away those in the "middle ground of public opinion."¹³⁵ Alternatively, the national organizations may simply expect that the initiative is likely to fail, and therefore do not want to be associated with a losing cause.

Seeing as numerous national animal organizations specifically decry the statutory exemptions under the cruelty laws for standard industry practices, it seems more likely that the mainstream animal protection movement could get behind an iteration of the Oregon initiative that eliminates exemptions but adds a "justifiable" qualifier, so that it would be up to a jury to decide which standard industry practices are indeed cruel. If such an initiative were combined with a private right of action, this would allow advocates to challenge extreme forms of cruelty that juries may reasonably find to be cruel (regardless of the profitability of such cruelty), such as that previously discussed in foie gras production, as well as, for example, molting,¹³⁶ maternal deprivation experiments, toxicity testing, Draize tests,¹³⁷ confined without access to the outdoors, surgery without anesthetic (e.g. debeaking, castration, tail docking, etc), and solitary confinement).

In order to ensure that the private right of action could go before a jury rather than a judge, the cause of action would have to be civil (lest the criminal corporate defendant be able to opt for a bench trial). This could be in the form of a civil analogue to the cruelty statute, as exists in North Carolina (and discussed further *infra*.)

¹³⁶ Molting has traditionally been induced by withdrawing feed from four days to as long as two weeks. Recognizing the cruelty of this practice, the United Egg Producers guidelines now state that only non-feed-withdrawal molt methods—such as using specialized feed for non-producing hens and minimizing exposure to light—will be permitted for United Egg Producers (UEP) members. That being said, adherence to UEP guidelines is voluntary. *See Guidelines for Cage Housing*, UNITED EGG PRODUCERS CERTIFIED 10 (2017), https://uepcertified.com/wp-content/uploads/2021/08/Caged-UEP-Guidelines_17.pdf.

¹³⁷ Courts have held that states and localities may prohibit even those activities for which a particular person holds an AWA license, so long as (1) the law does not interfere with the animal welfare purpose of the Act (i.e. "to foster humane treatment and care of animals"), and (2) it is not "physically impossible to comply with both the federal and local regulations." *See* DeHart v. Town of Austin, 39 F.3d 718, 720 (7th Cir. 1994) (upholding "total prohibition" on possession of exotic or wild animals, despite plaintiff being licensed under the AWA as a dealer whose business includes the purchase and/or resale of wild or exotic animals); N.Y. Pet Welfare Ass'n, Inc. v. City of New York, 850 F.3d 79, 88 (2d Cir. 2017) (upholding law providing that City pet shops may obtain dogs or cats only directly from federally-licensed Class A breeders, despite plaintiffs having valid Class B animal dealers' license).

¹²⁹ Id.

¹³⁰ See In Re Title, Ballot Title & Submission Clause for 2021-2022 #16, 489 P.3d 1217, 1225 (Colo. 2021).

¹³¹ See John Aguilar, Animal Cruelty Ballot Measure Is Invalid, Colorado Supreme Court Rules, DENVER POST (June 21, 2021, 1:49 PM), https://www.denverpost.com/2021/06/21/animal-cruelty-livestock-colorado-ballot-measure-initiative-16-invalid/.

¹³² MINN. STAT. ANN. § 343.21.

¹³³ See National Meat As's. v. Harris, 565 U.S. 452 (2012).

¹³⁴ Tim Hearden, National Animal Groups Shun Oregon, Colorado Initiatives,

FARM PROGRESS (Apr. 28, 2021), https://www.farmprogress.com/livestock/national-animal-groups-shun-oregon-colorado-initiatives.

 $^{^{\}rm 135}\,$ Lyle Munro, Compassionate Beasts: The Quest for Animal Rights 101 (2001).

iii. Leverage Private Rights of Action to seek Corporate Liability for Standard Cruelty before a Jury, and Amend Codes to make Corporations more Liable for Cruelty

Given the difficulties of securing standing to challenge animal cruelty, and the reluctance of prosecutors to hold corporate offenders accountable, statutes that grant standing to any person or organization to halt animal cruelty via injunction is essential. North Carolina employs such a statute, though it is rife with exemptions for corporate cruelty.¹³⁸ Several other states allow limited private prosecution specifically for violations of animal abuse and neglect laws such as Wisconsin (allowing a humane officer to request law enforcement officers and district attorneys to enforce and prosecute violations of state law and cooperate in those prosecutions),¹³⁹ Minnesota (allowing a citizen to apply to any court with allegation of animal cruelty for a warrant and for investigation),¹⁴⁰ Pennsylvania (allowing an agent of any society or association for the prevention of cruelty to animals to have the same powers to initiate criminal proceedings provided for police officers and to have standing to request a court to enjoin a violation of animal cruelty laws),¹⁴¹ and Hawaii (allowing an agent of any society for the prevention of cruelty to animals to make arrests and bring offenders before a judge).¹⁴²

Of course, these statutes that limit powers to humane organizations have largely proven ineffective at addressing corporate cruelty. Hudson Valley Foie Gras, for example, is located in New York, where the ASPCA is empowered by statute to make arrests arising out of animal cruelty,¹⁴³ and yet, they have refused to act in spite of the documented animal cruelty at Hudson Valley.

New Jersey, however, provides a broader opportunity for a private right of action of a criminal violation:

If the board of chosen freeholders of a county or the governing body of a municipality fails to prosecute a claim or demand of the county or municipality, any court in which an action on such claim or demand is cognizable may, upon terms, allow a taxpayer and resident of the county or municipality to commence and prosecute an action upon the claim or demand in the name and on behalf of the county or municipality, if in the opinion of the court the interests of the county or municipality would be promoted thereby.¹⁴⁴

This type of law may garner more support since it does not target animal cruelty specifically. If a separate cause of action specifically for animal cruelty is created, the North Carolina experience warns that exemptions may be created over time.¹⁴⁵ Enacting a more general statute that would still allow for private citizens to pursue claims of animal cruelty may ultimately protect the integrity of the criminal animal cruelty statute. In order for the New Jersey law to prove useful, it would need to eliminate the provision that allows for a court's discretion in determining if the private action would promote the interests of the county or municipality.

Challenges through private rights of action should initially target those states lacking explicit exemptions for standardized animal cruelty. HVFG would make the ideal target for animal lawyers going forward. The product is already illegal in NYC and California precisely because it is so obviously cruel. Moreover, foie gras is not a staple of working families, but a decadent "treat" for the rich. Importantly, any such action should not attack the workers, themselves victims of abuse, recognizing that powerful corporate executives should be held accountable, whereas the opposite is generally the case after undercover investigations of factory farms.¹⁴⁶

Per the Model Penal Code (MPC) provisions for corporate liability, an advocate would need to prove that the cruelty "was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."¹⁴⁷ It is worth noting that ISE Farms in New Jersey was convicted for animal cruelty based on the neglect of hens who had been discarded by a farm employee on a pile of dead hens and left to die.¹⁴⁸ While the conviction was later overturned on other grounds, the issue of corporate liability

¹³⁸ William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39, 41 (2005).

¹³⁹ WIS. STAT. § 173.07 (4M).

¹⁴⁰ MINN. STAT. § 343.22(1).

¹⁴¹ 18 PA. STAT. ANN. § 5511(1).

¹⁴² HAW. REV. STAT. § 711-1110 (2018).

¹⁴³ See N.Y. Agric. & Mkts. Law § 37.

¹⁴⁴ N.J. STAT. ANN. § 2A:15-18 (WEST 2009).

¹⁴⁵ See generally Reppy, supra note 138.

¹⁴⁶ ALDF previously sought, through "Bella's Bill," to rehome New York's animal cruelty statute outside of the "Agriculture and Markets" title in the hopes of getting stronger enforcement. ALDF continues to push this bill, but it will do so with a focus on including corporate liability for animal cruelty and the addition of a private right of action. Unfortunately, courts have thus far rejected private rights of action under the cruelty code in New York. *See generally* Hammer v. Am. Kennel Club, 1 N.Y.3d 294 (N.Y. 2003). Foie gras is not produced elsewhere in the United States.

¹⁴⁷ MODEL PENAL CODE § 2.07(1)(c) (1962).

¹⁴⁸ State of New Jersey v. ISE Farms, Inc., Transcript of Sup. Ct. Warren Co. (March 8, 2001).

was readily established under New Jersey's corporate liability statute.¹⁴⁹ The New Jersey statute is based on the MPC but differs slightly:

- a) A corporation may be convicted of the commission of an offense if:
 - 1. The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation unless the offense is one defined by a statute which indicates a legislative purpose not to impose criminal liability on corporations. If the law governing the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply;
 - 2. The offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
 - 3. The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.¹⁵⁰

The first section of the New Jersey statute does not limit liability for agents acting within the scope of their employment and on behalf of the corporation to offenses outside of the criminal code.¹⁵¹ While this is a small change from the MPC, it could have major implications for holding corporations and individual employees liable for animal cruelty. Because the State would not be confined to the third provision of the MPC for corporate liability which requires evidence that the corporation "recklessly tolerated" criminal animal cruelty.¹⁵²

Finally, as a general matter, in pursuing private actions under the cruelty code, advocates should focus on those states that lack the federal standing requirements, such that an advocate may bring case on behalf of animal victims without alleging an injury on his or her behalf.¹⁵³

¹⁵³ See, e.g., Nat'l Paint & Coatings Ass'n v. State, 68 Cal. Rptr. 2d 360,
365 (Cal. Ct. App. 1997); Nichols v. Kan. Gov't Ethics Comm'n, 18 P.3d 270, 276-

These changes could be combined with specific legislative reforms that would make prosecuting corporations for animal cruelty easier.

A model statute could have different types of acts be strict liability, for instance, misdemeanor animal cruelty, and could additionally note that acts of felony animal cruelty should impute to the corporation under traditional respondeat superior principles. This would allow prosecutors to bring charges against corporations for the most common acts of animal cruelty, those classified as misdemeanors, in a more straightforward application.

Some reform proposals in other contexts have included imputing only a strict liability or negligence standard for corporations to be held liable for criminal offenses. In a memo sent by the Deputy Attorney General to "all component heads and United States attorneys" in June 1999, it explicitly declares that "corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment."¹⁵⁴

Examples of "organizational" liability include provisions in Part 2.5 of the Australian Commonwealth Criminal Code and art. 102(2) of the Swiss Penal Code. Each includes provisions for holding corporations directly liable for criminal offenses in circumstances where features of the organization of a corporation, including its 'corporate culture', directed, encouraged, tolerated, or led to the commission of the offense. This approach focuses on the corporation as an entity in and of itself and accepts the proposition that a corporation can be held blameworthy through its practices, policies, and procedures.

In April 2019, Warren introduced the Corporate Executive Accountability Act, S. 1010, 116th Cong. § 451 (2019). The bill, which was referred to the Committee on the Judiciary, would authorize prosecution of an executive officer of any corporation that generates more than \$1 billion in annual revenue for "negligently permit[ting] or fail[ing] to prevent" either a criminal or civil violation by the company. Thus, an executive could be criminally liable if the company he or she worked for committed a civil violation.

¹⁴⁹ Id.

¹⁵⁰ N.J. STAT. ANN. § 2C:2-7 (West 2022).

¹⁵¹ Id.

¹⁵² *Id.*

^{77 (}Kan. Ct. App. 2001); Minn. Pub. Int. Rsch. Grp. v. Minn. Dep't of Labor, 249 N.W.2d 437, 441 (Minn. 1976); City of Picayune v. S. Reg'l Corp., 916 So. 2d 510, 525 (Miss. 2005); Animal Legal Def. Fund v. Woodley, 640 S.E.2d 777, 778 (N.C. Ct. App. 2007); Kellas v. Dep't of Corr., 145 P.3d 139, 141-42 (Or. 2006); Hous. Auth. of Chester v. Penn. State Civil Serv. Comm'n, 730 A.2d 935, 940-41 (Pa. 1999).

¹⁵⁴ Memorandum from Deputy Dir. Gen. to all Component Heads & U.S. Att'ys (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

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Warren's bill provides that the corporation needs to either be convicted of or entered into a DPA or NPA related to the criminal violation of federal or state law for the executive to be criminally liable. It further states that an individual executive also may be prosecuted under the Act for any civil violation of federal or state law by his or her corporation if the corporation:

- 1. was found liable for such civil violation or entered into a settlement agreement with any federal or state agency regarding the violation; and
- 2. the violation affected the health, safety, finances, or personal data of not less than one percent of the population of either the United States or prosecuting state.

The bill is meant to target large corporations, and to penalize executives who play a role in the decision-making that leads to the corporations' civil and criminal offenses. By imputing similar liability to executives of corporations that commit animal cruelty, the law would better deter corporations and corporate executives from turning a blind eye to cruelty, incentivizing self-policing by imputing individual liability on top of corporate liability.

Working within current frameworks for general corporate criminal liability, one step forward would be to have more states adopt respondeat superior liability as opposed to the MPC § 2.07 provision. By utilizing the federal standard of liability, corporate liability is easier to impute on the basis that an agent was acting within the scope of employment, at least in part to benefit the corporation. While showing that cruelty "benefits the corporation" could still be difficult, it is easier than to show any involvement or knowledge of a high managerial agent.

One could argue that the processes and incentives in place make cruelty benefit the corporation. In current practice we see egregious cruelty prosecuted against individuals and not often against the corporation. However, systemic cruelty—the kind that is incentivized by the corporate structure, could be shown to benefit the corporation more directly. In terms of reform, while disparities exist between state and federal prosecutors, respondeat superior would certainly be a better place to start than the MPC § 2.07 provisions when working to prosecute corporations within a state for animal cruelty.

Finally, states that currently allow a compliance defense to corporate criminal liability provide another loophole for corporations to escape animal cruelty charges. Even if we look to move states to respondeat superior liability instead of MPC's narrow liability, we should include reforming the availability of this defense to corporations

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facing charges. In practice, this loophole can provide corporations the ability to implement policies that do not target the underlying reasons or incentives for the cruelty that occurs in the corporate context. Therefore, staying within current frameworks for corporate liability, removing the availability of this defense for cases of animal cruelty will be crucial.

b. Reification and Expansion of the Rights of Animals and Activists at the Local Level

The importance of recognizing animal rights for their own sake, absent some benefit to human beings, has major importance for the future of animal law, both as a precedent that can be leveraged in future rights-based litigation, and as a way of shifting the way in which the aforementioned voters, jurors, etc. perceive animals to rights-bearers rather than beings upon whom we may treat with varying levels of empathy, limited by the extent to which that empathy may interfere with human desires. Absent a corresponding shift in the way in which society views animals, progress through democratic engagement has a utilitarian ceiling, i.e. a jury, while unaccountable to industry pressures and therefore unsusceptible to concerns about political donations, reelection, job security, corporate profitability, etc., will still reflect the overarching social values and customs, which remain deeply anthropocentric, if a contradiction in terms.¹⁵⁵

i. Codify Animal Rights, Some of which Already Exist

When ALDF brought suit on behalf of Justice the horse in Oregon arising from injuries he suffered due to severe neglect, the circuit court held that "Justice lacks the legal status or qualifications necessary for the assertion of legal rights and duties in a court of law." ¹⁵⁶In actuality however, and as ALDF contends on appeal, Justice, along with every other animal in Oregon, already has the "legal right" under

¹⁵⁵ See Cathy Siegner, Survey: Most Consumers Like Meat, Slaughterhouses Not so Much, FOODDRIVE (Jan. 25, 2018), https://www.fooddive.com/news/surveymost-consumers-like-meat-slaughterhouses-not-so-much/515301/ (noting a survey from Oklahoma State University which found that while more than 90% of U.S. consumers eat meat, 47% of them agreed with the statement, "I support a ban on slaughterhouses"); New Poll Shows Majority Uncomfortable with Animal Farming Despite Eating Turkeys for Thanksgiving, SCI. INST. (Nov. 20, 2017), https://www. sentienceinstitute.org/press/animal-farming-attitudes-survey-2017 (noting a second survey that had nearly identical results).

¹⁵⁶ Or. Jud. Dep't, Wash. Cnty. Circuit Ct., Twentieth Jud. Dist., Opinion Letter re. Justice vs Gwendolyn Vercher (Sept. 17, 2018), https://www.animallaw. info/sites/default/files/Justice%20the%20horse%20opinion%20letter.pdf [hereinafter Justice Opinion Letter].

Oregon's cruelty statute not to be neglected or abused, including the right to adequate food, potable water, shelter, and veterinary care.¹⁵⁷ The same could be said of animals throughout the country under each state's respective cruelty statutes. Of course, the statutes do not specifically frame these statutes in terms of the animal's "right," but that right is implied by the corresponding duty of the human custodian or guardian.¹⁵⁸

Given the court's reluctance to recognize Justice the horse's rights under the cruelty statute in Oregon, it would be prudent for advocates to draw upon explicit rights-oriented language in future animal-related legislation, i.e. "animals have the right not to be neglected and abused." Specifically confirming that animals have rights under state animal cruelty laws (limited though they may be), will prove helpful in efforts to expand those rights at the local level (as discussed in the next section).

ii Establish Animal Personhood at the Local Level

As Justice Douglas noted in his *Wheeling Steel Corp. v. Glander* dissent, the definition of legal personhood has been stretched and reshaped by courts without coherent legal justification, with the Supreme Court engaging in "distortion to read 'person' as meaning one thing, then another within the same clause and from clause to clause." ¹⁵⁹ When juxtaposed with the absurdity of over a century's worth of "make it up as you go" corporate personhood jurisprudence, the notion that animals, as rights-bearers, might be considered legal persons is not such a radical leap. Indeed, renowned legal scholars have recognized the sound legal basis for local ordinances that establish standing for persons to bring actions directly on behalf of nonhuman animal plaintiffs.¹⁶⁰

Under California law standing can b

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Under California law standing can be created by local ordinance.¹⁶¹ Alternatively, a city might reclassify animals as "sentient beings,"¹⁶² replacing all references to ownership and possession of dogs and cats in the municipal code with "guardianship" and "custody."

iii. Protect and Expand the Right to Document Animal Cruelty and Rescue Animals

In addition to eliminating statutory exemption for standardized cruelty and establishing private rights of action to hold corporations accountable, it is vital that advocates continue to defend and expand the right to document corporate cruelty, otherwise corporations will be able to hide said cruelty behind closed doors. ALDF has joined with a coalition of advocacy organizations in challenging ag-gag laws in court to great success, with ag-gag laws ruled unconstitutional on free speech grounds in Kansas, North Carolina, Wyoming, Idaho, Utah, and Iowa (twice), a challenge of Arkansas' ag-gag statute currently before the Eighth Circuit.¹⁶³

While documenting animal cruelty by corporations, advocates invariably come upon animals in need of urgent veterinary care. In some instances, advocates have rescued those animals, and have subsequently faced felony charges for trespass and theft. The notion that concerned individuals have a right to rescue sick or dying animals has basis in law, albeit in limited circumstances. Several states already have codified the right to rescue animals from "hot cars," so long as the person notifies law enforcement. And while most of these "hot car" laws are limited to the

¹⁵⁷ OR. REV. STAT. § 167.33(1)(1) (prohibiting criminally negligent failure to provide minimum care); OR. REV. STAT. § 167.322 (prohibiting maliciously killing or intentionally torturing an animal). The Court did not find it compelling that Oregon had amended the state's animal cruelty statute in 2013 to specifically highlight that the purpose of the law is to protect animals as "sentient beings capable of experiencing pain, stress and fear" who "should be cared for in ways that minimize pain, stress, fear and suffering." OR. REV. STAT. § 167.305(1), (2); *see* Justice Opinion Letter, *supra* note 156.

¹⁵⁸ Cetacean Cmty. v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004) ("[a]nimals have many legal rights, protected under both federal and state laws."); *see also* Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights) A Tribute to Kenneth L. Karst*, 47 UCLA L. REV. 1333, 1335 (2000) ("it is entirely clear that animals have legal rights, at least of a certain kind").

¹⁵⁹ Wheeling Steel Corp. v. Glander, 337 U.S. 562, 579 (1949).

¹⁶⁰ See, e.g., Steven M. Wise et al., *The Power of Municipalities to Enact Legislation Granting Legal Rights to Nonhuman Animals Pursuant to Home Rule*, 67 SYRACUSE L. REV. 31 (2017); Sunstein, supra note 158, at 1367.

¹⁶¹ California is not subject to the federal standing requirements as the California Constitution contains no "case or controversy" requirement. *See, e.g.,* Nat'l Paint & Coatings Ass'n v. State, 58 Cal. App. 4th 753, 761 (Cal. Ct. App. 1997) (rejecting claimed standing requirement based on federal citations, noting that the California Constitution "contains no 'case or controversy' requirement").

¹⁶² While not going so far as to explicitly remove animals from the property paradigm, Oregon has declared via statute that animals are "sentient beings capable of experiencing pain, stress and fear." OR. REV. STAT. § 167.305(1) (2017).

¹⁶³ Nicole Pallotta, *Though Ruled Unconstitutional, Industry Continues Pushing Ag-Gag Laws: Updates in North Carolina, Kansas, Iowa, and Ontario,* ANIMAL LEGAL DEF. FUND (Sept. 15, 2020), https://aldf.org/article/though-ruled-unconstitutional-industry-continues-pushing-ag-gag-laws-updates-in-north-carolina-kansas-iowa-ontario/.

rescue of companion animals, California,¹⁶⁴ Ohio,¹⁶⁵ and Massachusetts¹⁶⁶ each allow for private persons to rescue any animal victim in imminent danger from a vehicle.¹⁶⁷ Washington¹⁶⁸ and California ¹⁶⁹ allow persons to provide aid to animals impounded or confined without necessary

¹⁶⁴ California rants civil immunity for any person who takes reasonable steps to remove an animal from a vehicle if that animal's "safety appears to be in immediate danger from heat, cold, lack of adequate ventilation, lack of food or water, or other circumstances that could reasonably be expected to cause suffering, disability, or death to the animal," and that person calls law enforcement after entry. CAL. CIV. CODE § 43.100 (2017). In addition, California grants criminal immunity if that person takes specific steps first, such as contacting law enforcement, has a good faith belief that entry is necessary, remains with the animal in a safe location, and uses only as much force as necessary. CAL. PENAL CODE § 597.7(b) (2017)

¹⁶⁵ Ohio grants civil immunity for damage resulting from forcible entry of a vehicle "for the purpose of removing an animal" or a minor from the vehicle if certain conditions are met, including having a good faith belief that the animal is in imminent danger, making a good faith effort to call 9-1-1 before entry, not using more force than is reasonably necessary, and making a good faith effort to leave notice on the vehicle's windshield about the reason for entry into the vehicle. OHIO REV. CODE ANN. § 959.133(a) (2016).

¹⁶⁶ Massachusetts grants civil and criminal immunity for entering a motor vehicle to remove an animal if certain requirements are met, such as making reasonable efforts to locate the vehicle owner and notifying law enforcement. MASS. GEN. LAWS ANN. ch. 140, § 174F (West 2018).

¹⁶⁷ To the extent that the 28 Hour Law might preempt these state "hot car" laws as to farmed animals, advocates could nonetheless advocate that persons leverage these laws to rescue poultry, since the statute does not protect it. *See* 49 U.S.C. § 80502.

¹⁶⁸ WASH. REV. CODE ANN. § 16.52.100 (West 2020) ("If any domestic animal is impounded or confined without necessary food and water for more than thirty-six consecutive hours, any person may, from time to time, as is necessary, enter into and open any pound or place of confinement in which any domestic animal is confined, and supply it with necessary food and water so long as it is confined. The person shall not be liable to action for the entry, and may collect from the animal's owner the reasonable cost of the food and water."). While "domestic animal" is not explicitly defined, the term refers to farmed animals in other sections of this chapter. *See* WASH. REV. CODE ANN. § 16.52.110 (West 2020) ("Every sick, disabled, infirm, or crippled horse, ox, mule, cow, or other domestic animal."); WASH. REV. CODE ANN. § 16.52.095 (West 2020) ("It shall not be lawful for any person to cut off more than one-half of the ear or ears of any domestic animal such as an ox, cow, bull, calf, sheep, goat or hog, or dog.").

¹⁶⁹ CAL. PENAL CODE § 597e (Deering 2022) ("In case any domestic animal is at any time so impounded and continues to be without necessary food and water for more than 12 consecutive hours, it is lawful for any person, from time to time, as may be deemed necessary, to enter into and upon any pound in which the animal is confined, and supply it with necessary food and water so long as it remains so confined. That person is not liable for the entry and may collect the reasonable cost of the food and water from the owner of the animal, and the animal is subject to enforcement of a money judgment for the reasonable cost of such food and water.").

food and water. Animal lawyers should be prepared to defend activists who act to protect animals under these laws, an undertaking that might include leveraging the necessity defense in instances where activists rescued sick or dying animals.¹⁷⁰

¹⁷⁰ See, e.g., Jenni James, When is Rescue Necessary? Applying the Necessity Defense to the Rescue of Animals, 7 STAN. J. OF ANIMAL L. & POL'Y 1 (2014).